No. 77-484

In the Supreme Court of the United States

OCTOBER TERM, 1977

GARLAND C. COCHRAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App.) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1977. The petition for a writ of certiorari was filed on September 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court erred in allowing the prosecutor to call a previously convicted co-defendant as a witness after the

co-defendant had indicated that he would refuse to answer any questions.

2. Whether petitioner was prejudiced because, in conformity with local practice, the district court appointed the jury foreman.

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of conspiracy to import and importation of marihuana, in violation of 21 U.S.C. 952(a), 960 and 963.[1] He was sentenced to eight years' imprisonment, to be followed by two years' special parole. The court of appeals affirmed (Pet. App.).

1. The sufficiency of the evidence adduced at trial is not challenged. It showed that from 1972 to June 1974, petitioner and his co-defendants devised and implemented a scheme to import and distribute substantial amounts of marihuana into the United States from Colombia. As part of the illegal enterprise, the defendants recruited airplane pilots who transported the marihuana in privately owned or leased airplanes (Tr. 72-79, 91-100, 109-112, 117-119). Petitioner, his co-defendants, and the pilots (one of whom was a government informant (Tr. 78)) held several

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[1]In September 1974, petitioner and 10 co-defendants were charged with conspiracy to import, importation of and possession of with intent to distribute 15,000 pounds of marihuana into the United States. On December 9, 1974, the case proceeded to trial against nine of the defendants; petitioner and another co-defendant had not been apprehended by that date, and accordingly their cases were severed. Following the trial, six defendants were found guilty and three were acquitted. The convictions were affirmed. *United States* v. *Velasco*, 539 F. 2d 707 (C.A. 4), certiorari denied, 429 U.S. 977. Petitioner was apprehended on May 18, 1977.

meetings in Colombia, southern Florida, and Georgia, including one meeting at petitioner's residence, at which they discussed remote landing strips to be utilized in transporting the marihuana, the availability of private aircraft, and airplane maintenance problems (Tr. 79-88, 93-114, 290-294).

In June 1974, the pilots went to San Antonio, Texas, where co-defendant Joseph Pruitt gave them his privately owned DC-4 airplane. The pilots then flew the aircraft to Waycross, Georgia, where it developed severe maintenance problems (Tr. 117-122, 298). Due to these difficulties, one of the pilots sought to discontinue the entire operation. After petitioner told the pilot that he had invested $500,000 in the operation, however, the pilot agreed to continue once repairs were made (Tr. 120-121, 298-300). From Waycross, the plane was flown to Rio Hacha, Colombia, where it was loaded with a large quantity of marihuana. Upon its arrival at Chester, South Carolina, the aircraft was seized by Customs and Drug Enforcement Administration agents (Tr. 122-127, 300-303).

2. Joseph Pruitt, one of petitioner's co-defendants, was tried and convicted for his role in the drug operation in December 1974, while petitioner was a fugitive. See note 1, *supra*. During that trial, Pruitt had described his dealings with petitioner in detail, particularly his loan of the DC-4 aircraft that had been used to import the marihuana (Tr. 259-261). In light of this testimony, the government subpoenaed Pruitt to testify about these matters at petitioner's trial.

Prior to Pruitt's being called as a witness, however, his counsel advised the prosecutor that Pruitt would refuse to testify. In an effort to avoid any prejudice to petitioner, the prosecutor promptly brought the matter to the district

court's attention out of the jury's presence (Tr. 249-250). Pruitt's counsel informed the court that, if called, Pruitt intended to invoke his Fifth Amendment privilege against self-incrimination (Tr. 251-252). Following a lengthy hearing, the court determined that Pruitt could no longer claim his privilege against self-incrimination as to matters he previously had voluntarily testified about and that, moreover, since he had already been convicted he could face no further prosecution as a result of his admissions (Tr. 262, 268, 270-271). Despite this ruling, Pruitt maintained that he would nevertheless refuse to answer any questions (Tr. 267-268).

Petitioner's counsel objected to the court's requiring Pruitt to assert a Fifth Amendment claim, however invalid, before the jury (Tr. 269). To alleviate petitioner's concern, the court allowed Pruitt formally to assert his claim of privilege to three questions propounded by the prosecutor outside the jury's presence (Tr. 270-276). Thereafter the jury was returned and Pruitt was asked two of the same questions. Pursuant to instructions given by the court during the hearing (Tr. 270-271, 275-276), Pruitt declined to answer without stating a reason (Tr. 277-281).[2] Pruitt was then dismissed (Tr. 277-281).

ARGUMENT

1. Petitioner contends (Pet. 9-14) that the district court erred in allowing the prosecutor to call co-defendant Pruitt as a witness after Pruitt had indicated his intention to refuse to testify. This contention is insubstantial.

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[2]Despite petitioner's counsel's apparent acquiescence in this procedure (Tr. 269-275), he objected to the questioning during Pruitt's examination (Tr. 278-279).

In *Namet* v. *United States*, 373 U.S. 179, this Court held that "a claim of evidentiary trial error" based upon the government's questioning of a witness with knowledge that he would claim his Fifth Amendment privilege may not be sustained unless the situation was the product of "prosecutorial misconduct" (*id.* at 186) or the "witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination and thus unfairly prejudiced the defendant" (*id.* at 187). Neither requirement is satisfied here.

The prosecutor and the district court could reasonably have believed that Pruitt's conviction, which had been affirmed on appeal, eliminated any Fifth Amendment privilege he may have had to refuse to discuss his conduct in the drug conspiracy. See *Namet* v. *United States*, *supra*, 373 U.S. at 188. There was thus nothing improper in the court's ruling that Pruitt could be compelled to testify concerning his dealings with petitioner with respect to Pruitt's DC-4 aircraft, matters to which Pruitt had voluntarily testified in his previous trial.[3] In light of this ruling, the prosecutor could legitimately have expected and demanded Pruitt's testimony, under the threat of contempt if necessary, and Pruitt's persistence in his refusal to testify therefore cannot be attributed to the government. Accordingly, this is clearly not a case where the prosecution made "a conscious and flagrant attempt to build its case out of inferences arising from use of

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[3]Indeed, Pruitt's voluntary testimony as to these matters on direct examination at his trial also precluded a valid claim of privilege.

testimonial privilege." *Namet* v. *United States, supra*, 373 U.S. at 186. See *United States* v. *Edwards*, 366 F. 2d 853, 870 (C.A. 2), certiorari denied *sub nom. Jakob* v. *United States*, 386 U.S. 908. Indeed, it was government counsel who had alerted the court that Pruitt might attempt to assert a Fifth Amendment claim.

Moreover, Pruitt's refusal to answer two questions asked by the prosecutor in the jury's presence amounted to "no more than minor lapses through a long trial" (*United States* v. *Hiss*, 185 F. 2d 822, 832 (C.A. 2), certiorari denied, 340 U.S. 948) and can hardly be said to have added "critical weight to the government's case" (Pet. 9). See *Namet* v. *United States, supra*, 373 U.S. at 187-189; *United States* v. *Quinn*, 543 F. 2d 640, 650 (C.A. 8); *United States* v. *Brickey*, 426 F. 2d 680, 688 (C.A. 8), certiorari denied, 340 U.S. 948), and can hardly be said to minimized any possible prejudice to petitioner by allowing Pruitt to decline to answer the questions before the jury without using the terms "Fifth Amendment" or "self-incrimination," a procedure (as we have noted) in which petitioner's counsel had seemingly acquiesced. In any event, in light of the overwhelming evidence of petitioner's guilt (the sufficiency of which is not contested), petitioner could not have been prejudiced by this incident.

2. Petitioner contends (Pet. 14-16) that it was improper for the district court to appoint the jury foreman. It has been the longstanding practice in the United States District Court for the District of South Carolina, however, for the trial judge to appoint the foreman of the jury in all civil and criminal cases (Tr. 17-18; Pet. 14). When a juror initially reports for duty in the District he is furnished a booklet entitled "HANDBOOK FOR JURORS serving in the UNITED STATES DISTRICT

COURT." The handbook, which is published by authorization of the Judicial Conference of the United States Courts, contains the following (p. 11):

> In some districts the judge selects the foreman of the jury. In other districts the jurors elect their foreman and in still other districts the first juror to enter the jury box becomes the foreman automatically. The judge will inform you which method is used in your district. The foreman should be a person capable of presiding and should be one who would give every juror a fair opportunity to express his views.

In challenging the practice by which the trial judge selects the jury foreman, petitioner asserts that, as a result of his appointment, the foreman necessarily becomes imbued with more authority in the jury room than he would have if he were chosen by the jurors themselves. Consequently, he argues, the foreman's views and opinions will be given greater weight than those of the other jurors. These contentions are wholly speculative: petitioner fails to allege, and there is nothing in the record to suggest, that he suffered any prejudice because of the court's appointment of the foreman or that the jurors were disposed to defer to the foreman's views. To the contrary, in its final instructions to the jury, the court remarked (Tr. 421):

> That brings us down to the form of the verdict. Mr. Foreman, as I have told you, you will have with you in the jury room, and I address you because I've got to have somebody to turn the proceedings over to in that capacity; however, the fact that he is the acting foreman of that jury doesn't give any priorities or more power to him than any other member of the

> jury. Sometimes it has been suggested that maybe the Court doesn't make a jury understand that everybody has got equal rights sitting on that jury.

There is no reason to presume that the jury ignored this admonition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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